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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

NO. 85-461

CONTROL DATA CORPORATION,
*Petitioner,*

versus

C. E. SERVICES, INC.,
*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## BRIEF IN OPPOSITION

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## COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the court below properly adhere to the relevant market analysis enunciated in *Brown Shoe Co. v. United States,* 370 U.S. 294 (1962).

2. Did the Court below properly deny summary judgment under Section 2 of the Sherman Act, 15 U.S.C. § 2, when material issues of fact remained as to the size of the relevant service market.

## LIST OF PARTIES

Control Data Corporation, Petitioner

C. E. Services, Inc., Respondent

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## BRIEF IN OPPOSITION

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## COUNTERSTATEMENT OF THE CASE

This case was brought by Respondent C. E. Services, Inc. against Petitioner Control Data Corporation alleging, among other things, monopolization and attempted mo-

nopolization in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. Respondent and Petitioner are both in the business of performing maintenance work on IBM 360 and 370 computers, and both are known as third-party maintenance firms because the work they perform is on IBM machines. Respondent alleges that Petitioner has monopolized and attempted to monopolize the market for third-party maintenance of IBM 360 and 370 computers in the Dallas and Tarrant County region of Texas. Petitioner moved the trial court for summary judgment on Respondent's antitrust claims, and the trial court granted Petitioner's motion. *C. E. Services, Inc. v. Control Data Corporation,* Civil Action No. 4-78-317K (N.D. Tex., August 8, 1983) (Petition for Writ of Certiorari ("P.") at A-18). The relevant service market for IBM 360 and 370 computer maintenance, in the trial court's view, unarguably included maintenance work performed by IBM. (P. at A-9) IBM's inclusion in the relevant service market would lower Petitioner's share of the maintenance market to between 20 and 25%—below monopolistic levels. (P. at A-4)

The Court of Appeals for the Fifth Circuit reversed, holding that Respondent had raised genuine issues of material fact as to whether IBM should be excluded from the relevant service market. Without IBM, Petitioner's share of the maintenance market is well over 80%, and Petitioner would clearly have monopoly power. (P. at A-4) The Court below accordingly remanded Respondent's antitrust claims for trial. Challenging the propriety of the Court of Appeal's relevant market analysis and ultimately the wisdom of this Court's decision in *Brown Shoe Co. v. United States,* 370 U.S. 294 (1962), Petitioner filed this Petition for Writ of Certiorari.

## ARGUMENT

### A. Introduction

This petition presents no issues suitable for discretionary review. Sup. Ct. Rule 17. Instead, petitioner asks the Court to overturn long-settled principles of antitrust law, and to second-guess the reasoned decision below holding that Respondent's proof of relevant market was sufficient to preclude summary judgment against Respondent's antitrust claims. Unless the Court is prepared to reverse *Brown Shoe* and abandon *Brown Shoe's* flexible relevant market analysis, the Petition for Writ of Certiorari should be denied.

### B. The Court Below Properly Adhered to the *Brown Shoe* Relevant Market Analysis

Petitioner's only substantive argument hinges upon a willingness by the Court to overturn its decision in *Brown Shoe*. Petitioner calls the *Brown Shoe* decision "erroneous and confusing" (P. at 5) and asks the Court to reexamine and reject that portion of *Brown Shoe* which emphasizes that within a broad product market,[1] "well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 593-595, 77 S. Ct. 872, 877, 1 L.Ed.2d 1057." *Brown Shoe*, 370 U.S. at 325. In support of its position, Peti-

1. Section 2 of the Sherman Act and *Brown Shoe's* flexible relevant market analysis are equally applicable to product and service markets. *See, e.g., United States v. Connecticut National Bank*, 418 U.S. 656, 659-62 (1974); *United States v. Grinnell Corp.*, 384 U.S. 563 (1966) (accredited and unaccredited alarm stations comprise distinct service submarkets for purposes of Section 2 of the Sherman Act).

tioner cites recent articles which question the utility of the submarket concept. *See, e.g.*, Maisel, *Submarkets In Merger and Monopolization Cases,* 72 Geo. L. J. 39 (1983); MacLeod, *The Relevant Product Market After Brown Shoe: A Framework of Analysis for Clayton and Sherman Act Cases,* 12 Loy. U.L.J. 321 (1981). Petitioner, however, points to no decisions which challenge *Brown Shoe's* relevant market analysis or the concept of submarket itself. Furthermore, even one of the articles Petitioner relies on concedes: "It is difficult to take issue, on a theoretical level, with the general rule and standards espoused in *Brown Shoe*. . . ." MacLeod, 12 Loy. U.L.J. at 334.

The *Brown Shoe* Court created submarkets by dividing the broad domestic shoe market into three distinct competitive submarkets: men's, women's and children's shoes. The notion of submarkets was so intertwined with *Brown Shoe's* fact-sensitive relevant market analysis that this Court would have to reverse *Brown Shoe* in its entirety in order to adopt Petitioner's reasoning in this case.

Petitioner complains that no sound analysis should segregate IBM's maintenance of its own computers from the maintenance efforts of third-party maintenance firms. As a matter of law, according to Petitioner, there can be no finding of submarket here because the maintenance offered by IBM is "identical" to that offered by third-party maintenance firms. This position reveals a profound misunderstanding of *Brown Shoe*. Shoes were not just "shoes" for relevant market purposes. Instead, "by examining such practical indices as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensi-

tivity to price changes, and specialized vendors . . .", the Court concluded that shoes should be separately grouped, for antitrust purposes, as men's, women's, and children's shoes. *Id.* at 326. By calling IBM's maintenance services "identical", Petitioner begs the question and avoids the factual analysis mandated by *Brown Shoe*.[2]

Contrary to Petitioner's argument that *Brown Shoe* ushered in two conflicting modes of relevant market analysis, a careful reading of the case leaves no room for conflict. The term "submarket" was merely descriptive of the Court's conclusion, after examining the practical indices quoted above, that the entire shoe market had to be divided into three distinct categories to reflect economic reality. Petitioner misreads the Court's discussion of "reasonable interchangeability of use or the cross-elasticity of demand" as a separate test of relevant market: this language describes only the "outer boundaries" of the "broad product market" and not the *relevant* market for antitrust purposes. *Id.* at 326. The *Brown Shoe* Court's analysis of the practical indices of submarket in the shoe industry was a clear mandate for just the sort of fact-sensitive analysis needed here. For precisely this reason, the court below remanded this case for trial.

Despite Petitioner's insistence that the notion of submarket and the discussion of practical indices were *dicta* in *Brown Shoe,* the Court in *Brown Shoe* and in subsequent decisions engaged in detailed factual analyses of the practical indices of relevant market. In *United States v. Continental Can Co.,* 378 U.S. 441, 457

2. The Court below found ample evidence that IBM and third-party maintenance firms do not provide identical services. *See* Section C, *infra.*

(1964), the Court defined a relevant product market which included metal and glass containers but excluded plastic, paper, foil and other containers which were "competing for the same business." The decision to draw the line at glass and metal containers was directly predicated upon the Court's *Brown Shoe* analysis of the competitive interplay between glass and metal containers in the broad container market. Similarly, the Court in *United States v. Grinnell Corp.*, 384 U.S. 563, 575 (1966), recognized separate service submarkets for accredited and unaccredited alarm stations despite the fact that all alarm stations performed the same basic service. In *Grinnell,* as in this case, there was evidence of marked price differences between the two submarkets. *Id.* Moreover, in *Grinnell* "[t]here [was] indeed evidence that customers consider[ed] the unaccredited services as inferior." *Id.* In this case too, there is ample evidence that IBM customers consider the maintenance work of third-party firms inferior. *C. E. Services v. Control Data Corp.*, 759 F.2d 1241, 1246 (5th Cir. 1985) (P. at B-11); *see also, Photofest Corp. v. Fotomat Corp.*, 606 F.2d 704 (7th Cir. 1979), *cert. denied,* 445 U.S. 917 (1980) (processing film at a kiosk constitutes a separate service market within the broad film processing market); *International Boxing Club of New York v. United States,* 358 U.S. 242 (1959) (pre-*Brown Shoe*) (championship boxing constitutes a separate service market within the broad boxing market).

The court below properly applied the practical indices test and concluded that Respondent's proof presented clear evidence of distinct differences between third-party maintenance and IBM maintenance of IBM 360 and 370 computers. The Court of Appeals, in denying summary

judgment, properly reserved for trial the ad-hoc, fact-specific determination of whose version of the relevant service market comports with economic reality. Thus, applying *Brown Shoe's* flexible relevant market analysis to Respondent's extensive proof of relevant submarket, the Court of Appeals correctly concluded that the single fact that Petitioner, Respondent and IBM all perform maintenance on IBM 360 and 370 computers fails to establish conclusively that they all belong in the same service market for Sherman Act purposes.

Petitioner would have the Court abandon the flexible and fact-sensitive *Brown Shoe* approach in favor of a rigid rule requiring relevant service markets to include, as a matter of law, all providers of similar services, regardless of other striking differences. Petitioner's *per se* rule would ignore economic and competitive reality and substitute an easy approach for the correct one. Because *Brown Shoe* wisely rejected the idea of a wooden *per se* rule, and because no good reason has been suggested to reverse that determination, the Petition for Writ of Certiorari should be denied.

### C. The Court Below Properly Denied Summary Judgment Against Respondent's Sherman Act Claims Where There Were Material Issues of Fact as to the Size of the Relevant Market

The Court below properly applied Fed. R. Civ. P. 56(c) in denying Petitioner's motion for summary judgment on Respondent's antitrust claims. The denial of summary judgment was amply supported by evidence of genuine issues of material fact, and as Petitioner candidly admits: "[t]he parameters of the relevant market are a factual issue. *Heatransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 964, 979 (5th Cir. 1979)." (P. at 4);

*see also, Sulmeyer v. Coca Cola Co.*, 515 F.2d 835, 849 (5th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976) (determination of relevant service market is a question of fact for the fact-finder).

As the Court of Appeals emphasized, Respondent presented affidavits, documentary evidence and deposition testimony amply supporting the following propositions: third-party maintenance firms do not view themselves as a part of a service industry which includes IBM; Petitioner's marketing and competitive planning concentrate on the other third-party maintenance firms—not on IBM; those who employ third-party maintenance firms do not view IBM as an alternative; there is a marked price difference between IBM's fees and those of all of the third-party maintenance firms; and, the third-party firms are the only firms which service the IBM 360 and 370 computer systems to the exclusion of all others. *C. E. Services v. Control Data Corp.*, 759 F.2d at 1246 (P. at B-11). By evaluating the strength of Respondent's evidence on these matters in light of the practical indices of relevant market specifically set forth in *Brown Shoe*, the court below properly concluded that summary judgment was wholly inappropriate. Therefore, the Petition for Writ of Certiorari should be denied.

## CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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